STATE OF MICHIGAN
IN THE SUPREME COURT

EMPLOYERS MUTUAL CASUALTY COMPANY,

Plaintiff/Counter-Defendant-Appellee,

Supreme Court 152994

v.

HELICON ASSOCIATES, INC., a Michigan corporation, ESTATE OF MICHAEL J. WITUCKI, in its capacity as successor in interest to Michael J. Witucki, a deceased individual,

Court of Appeals No. 322215

Defendants/Counter-Plaintiffs,

Wayne County Circuit Court
Case No. 12 -002767-CK

and

DR. CHARLES DREW ACADEMY, a Michigan public school academy, JEREMY GILLIAM,

Defendants, and

WELLS FARGO ADVANTAGE NATIONAL TAX FREE FUND, a series of the Delaware business trust known as the Wells Fargo Funds Trust, Delaware Business Trust, WELLS FARGO ADVANTAGE MUNICIPAL BOND FUND (in part as successor to the Wells Fargo Advantage National Tax-Free Fund), a series of the Delaware business trust known as the Wells Fargo Funds Trust, a Delaware business trust, LORD, ABBETT MUNICIPAL INCOME FUND, INC., on behalf of its series Lord Abbett High Yield Municipal Bond Fund, a Maryland corporation, PIONEER MUNICIPAL HIGH INCOME ADVANTAGE, a Massachusetts business trust, by Pioneer Investment Management, Inc., its investment advisor,

Defendants-Appellants.

PLAINTIFF/COUNTER-DEFENDANT-APPELLEE, EMPLOYERS MUTUAL CASUALTY COMPANY'S SUPPLEMENTAL BRIEF

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ARGUMENT

In its order granting oral argument on the application, this Court asks the parties to address two questions: "(1) whether the consent judgment amounts to a 'judgment or adjudication . . . based on a *determination*' of the insured's conduct [emphasis added]; and, if so, (2) whether it was a 'determination that acts of fraud or dishonesty were committed by the 'insured.'"" It is Employer's Mutual Casualty Company's position, as is more fully explained below, that the answer to both questions is "Yes."

I. The Judgment and Order of Dismissal entered by the District Court in the underlying action amounted to a judgment based on a determination that Helicon and Witucki violated the Connecticut Uniform Securities Act.

The Court's questions necessarily assume that the judgment at issue - the Judgment and Order of Dismissal, entered by Judge Murphy on April 25, 2012 - was a "consent judgment." In truth, reference to the Judgment as a "consent judgment" is a misnomer. The phrase "consent judgment" appears nowhere in the language of the judgment. There is no statement, express or implied, on the face of the judgment that it was based upon or the result of an agreement between or stipulation of the parties. Counsel for Helicon and Witucki approved the Judgment "as to form" only.[1] In contrast to a typical consent judgment, Helicon and Witucki did not admit or deny liability to The Trusts. Rather, the Court affirmatively ordered that "final judgment shall be, and hereby is, entered in favor of [The Trusts] and

[1] While it may prove true that an order approved "as to form and content" or "as to form and substance" can amount to a consent judgment, *Wold v Jeep Corp*, 141 Mich App 476, 479; 367 NW2d 421 (1985); *Longo v Minchella*, 343 Mich 373; 72 NW2d 113 (1955); no such argument can be made with respect to an order approved "as to form" only.

against [Helicon and Witucki] on [The Trusts'] Connecticut Securities Act claims . . . [in an amount] pursuant to Section 36b-29(a)(2) of the Connecticut Uniform Securities Act. . ." Exhibit A, Judgment and Final Order of Dismissal. On its face, and by its very terms, the Judgment and Order of Dismissal was just that - a judgment of liability in favor of The Trusts and against Helicon and Witucki. *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 218; 813 NW2d 752, 759 (2011), quoting 46 Am Jur 2d, Judgments, § 74, p 447 ("As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be declared in light of the literal meaning of the language used.")

Moreover, the procedural process which preceded entry of the Judgment and Final Order of Dismissal indicates that, whatever the label, this judgment was not the result of a negotiated settlement but, rather, a concession of liability which inevitably flowed from Judge Murphy's decisions which were adverse to Witucki and Helicon. In his decision denying their Motion for Summary Judgment, Judge Murphy specifically rejected each of Witucki's and Helicon's arguments as to why they could avoid liability as a matter of law. Following his adverse summary judgment decision, Judge Murphy denied additional motions filed by Witucki and Helicon raising defenses to the Trusts' claimed damages.[2] At that point, Helicon and Witucki determined that it was in their best interest to avoid trial and to allow a judgment to be entered against them. While the Judgment indicates an agreement as

[2]The result of these motions left Helicon and Witucki subject to strict liability for all of the Trusts' claimed damages, including pre-judgment interest and attorney fees. See Exhibit B, Order Denying Defendants' Motion to Confirm Applicability of "Loss Causation" to Plaintiffs' Claims; Exhibit C, Order Denying Defendants' Motions to Clarify Damages.

to the form of the judgment and the fact of its entry, it does not, on its face and by its terms, reflect agreement as to its substance or consent by Witucki and Helicon.

Courts have spoken in generalities of the distinctions between a consent judgment and a litigated judgment. For example, courts have noted that consent judgments are the act of the parties rather than considered judgment of the court. *Union v Ewing*, 372 Mich 181; 125 NW2d 311 (1963); *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958). Courts have concluded that the trial judge's action in signing a consent judgment is merely ministerial because the parties haven't litigated the matters at issue and the judge has not actually determined the matters at issue. *American Mutual Liability Ins Co v Michigan Mutual Liability Co*, 64 Mich App 315, 327; 235 NW2d 769 (1975). While this may be true of consent judgments in general, it is simply not true of the Judgment and Final Order of Dismissal in this case. The parties extensively litigated the factual and legal issues in the District Court.[3] Judge Murphy did not merely put a rubber stamp on the parties agreement to settle. Prior to the entry of the order, the parties had vigorously litigated the legal issues and established an extensive factual record and Judge Murphy had issued deliberative substantive decisions, all of which inevitably led to entry of an order stating that Helicon and

[3]Indeed, in the order denying summary judgment, Judge Murphy also considered whether he retained jurisdiction over the case after the Trusts' various amendments and settlements had strategically eliminated any remaining federal question. Recognizing the decision as a "rare instance" in which there was an "'overwhelming interest[] in judicial economy,'" Judge Murphy decided to exercise supplemental jurisdiction over the case because the case had been pending for more than three years, the Court had issued substantive orders, a trial was imminent and the parties had "thoroughly" briefed a summary judgment motion. Exhibit D, Order on Summary Judgment, page 4. Judge Murphy further noted that discovery had been closed for several months, the record was complex and voluminous and "this Court is already familiar with the relevant facts and law." Id.

Witucki were strictly liable to the Trusts for money damages, including pre-judgment interest and attorney fees, under the CUSA.

The above notwithstanding, even if this Court were to reject the judgment's clear language and disregard the procedural history of the judgment, and instead conclude that the Judgment and Final Order of Dismissal is considered a "consent judgment," it nevertheless amounts to a judgment based on a determination of the insured's conduct. Whether under Michigan law or Federal law, a consent judgment is a judicial act which possesses the same force and effect as a litigated judgment. See *Trendell v Solomon*, 178 Mich App 365; 443 NW2d 509 (1989) (a consent judgment possesses the same force and character as a judgment rendered following a contested trial); *Blakely v United States*, 276 F3d 853, 866 (6th Cir 2002) ("A consent judgment, which has been freely negotiated by the parties and has been approved by the court, has the full effect of final judgment for purposes of claim preclusion.") Whether the Judgment and Final Order of Dismissal is considered a consent judgment, a litigated judgment or, under the particular circumstances surrounding its entry, a hybrid judgment, it is a judgment all the same.

The next step in answering this Court's first question is whether the Judgment and Final Order of Dismissal was " . . . based on a *determination*" of the insured's conduct. The answer here is, "yes." As recognized by the United States Supreme Court in *United States v International Bldg Co*, 345 US 502, 506; 97 LEd 1182; 73 SCt 807 (1953), "[a] judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court." While the Trusts rely upon case authority discussing the preclusive effects

of a consent judgment under the doctrines of collateral estoppel and res judicata, the issue here is the meaning of the language in an insurance policy. This issue is governed, not by case authority analyzing the preclusive effect of judgments, but, rather, by established principles of Michigan law regarding construction of an insurance policy. One such principle holds that contractual terms are construed in context, according to their commonly used meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Further, when a term is undefined in the policy, the Court may consult a dictionary definition to determine the commonly understood meaning of that term. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005).

Merriam-Webster defines "determination" as "the settlement of a dispute, question, etc., as by authoritative decision; the decision or settlement arrived at or pronounced." Here, the Judgment specifically states that ". . . final judgment shall be, and hereby is, entered in favor of [the Trusts] and against [Helicon and Witucki] on [the Trusts'] Connecticut Securities Act claims . . . in [an amount of damages] . . . pursuant to Section 36b-29(a)(2) of the Connecticut Uniform Securities Act. . . ." Even assuming that the Judgment and Order of Dismissal was a consent judgment, it amounts to a judgment based on a "determination" (i.e., an authoritative decision, a settlement of the parties' dispute) of Helicon's and Witucki's conduct (violation of the CUSA). The Judgment did not state that Helicon and Witucki were merely generically liable to the Trusts or that Helicon and Witucki merely agreed to pay the Trusts the stated damages. Rather, the Judgment specified that Helicon and Witucki were liable to the Trusts on the specific Connecticut Securities Act claim and were ordered to pay the Trusts damages under Section 36b-29 of the CUSA. Accordingly, the Judgment and

Final Order of Dismissal was a judgment based on a determination of Helicon's and Witucki's conduct.

II. The Judgment and Final Order of Dismissal was a determination that acts of dishonesty were committed by Helicon and Witucki.

As with the first, the answer to the Court's second question is "yes." The Judgment and Final Order of Dismissal specifically determined that Helicon and Witucki were liable to the Trusts on the Trusts' Connecticut Securities Act claims and the Trusts were entitled to damages from Helicon and Witucki pursuant to Section 36b-29(a)(2) of the Connecticut Uniform Securities Act. That section provides:

> (a) Any person who . . . (2) offers or sells or materially assists any person who offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, who knew or in the exercise of reasonable care should have known of the untruth or omission, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight per cent per year from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security.

Conn Gen Stat §36b-29. Upon entry of the Judgment imposing liability on Helicon and Witucki under this statute, the Judgment possessed the same force and effect as a litigated judgment that Helicon and Witucki were liable under this section. *Trendell, supra*. In other words, upon entry of the Judgment, it was determined, just as surely as if the case had proceeded to trial, that (1) Helicon and Witucki were persons who offered or sold, or materially assisted a person who offered or sold, a security; (2) they did so by means of an

untrue statement of a material fact or an omission to state a material fact; and (3) they did not "sustain the burden of proof that [they] did not know, and in the exercise of reasonable care could not have known, of the untruth or omission". Whether the Judgment determined that Helicon and Witucki agreed/consented to these facts or whether it determined that the procedural history and extensive and considered evidentiary record established these facts, these facts were determined upon entry of the Judgment.

As the Court of Appeals determined, *Black's Law Dictionary* (10th ed) defines "dishonest" as "Deceitfulness as a character trait; behavior that deceives or cheats people; untruthfulness; untrustworthiness." Upon entry of the Judgment, it was determined that Helicon and Witucki made an untruthful statement or omitted to truthfully state a material fact and they failed to sustain their burden of proving that they did not know, and in the exercise of due care could not have known, that they had done so. Indeed, the extensive factual record established by the Trusts, considered by Judge Murphy, and which inevitably led to entry of the Judgment against Helicon and Witucki likewise established that Helicon and Witucki committed these dishonest acts. Accordingly, the Court of Appeals properly determined that the policy exclusion applied and EMC was entitled to summary disposition.

Finally, even if this Court were to disagree with or question the Court of Appeals analysis of the fraud or dishonesty exclusion, as explained in EMC's response to the application, coverage under the policy was clearly excluded under the personal profit and the guarantees on bond issues exclusions. This Court can affirm the circuit court's decision as having reached the right result, even if for the wrong reason. *People v Elliott*, 494 Mich 292, 323; 833 NW2d 284 (2013).

RELIEF REQUESTED

Plaintiff-Appellee, Employers Mutual Casualty Company, respectfully requests that this Court deny the Trusts' application for leave to appeal from the Court of Appeals December 1, 2015 decision affirming the circuit court's decision granting summary disposition. In the alternative, Plaintiff-Appellee requests that this Court affirm the circuit court's decision on the alternative bases raised in their response.

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Dated: August 12, 2016

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EXHIBIT LIST

Exhibit A	Judgment and Final Order of Dismissal
Exhibit B	Order Denying Defendants' Motion to Confirm Applicability of "Loss Causation" to Plaintiffs' Claims
Exhibit C	Order Denying Defendants' Motions to Clarify Damages
Exhibit D	Order Granting Plaintiff's Motion for Summary Judgment, dated May 27, 2014

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PROOF OF SERVICE

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Proof of Service: I certify that a copy of **PLAINTIFF/COUNTER-DEFENDANT-APPELLEE, EMPLOYERS MUTUAL CASUALTY COMPANY'S SUPPLEMENTAL BRIEF**, with attachments, and this **PROOF OF SERVICE** were served upon the following as indicated below:

Date of Service: August 12, 2016

Signature: /s/ Susan M. Westphal

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